Pasdec Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CASE STATED NO 14–7–07 OF 2014
ASMABI MOHAMAD J
3 JUNE 2015

Revenue Law — Income tax — Additional assessment — Respondent imposed additional assessments on appellant for years of assessment 1999, 2000 and 2002 — Special Commissioners of Income Tax rejected appellant's appeal and affirmed respondent's decision — Whether respondent entitled to raise additional assessment without first complying with s 91(3) of the Income Tax Act 1967 — Whether respondent correct in adopting different accounting basis for years assessment 1999, 2000 and 2002 — Whether imposition of penalties under s 113(2) of the Act against appellant correct — Income Tax Act 1967 ss 91(3), 97 & 113

This was an appeal against the decision of the Special Commissioners of Income Tax ('SCIT') which rejected the appellant's appeal and affirmed the decision of the respondent to impose additional assessments on the appellant for years of assessment 1999, 2000 and 2002; and the imposition of penalties on the appellant under s 113(2) of the Income Tax Act 1967 ('the Act'). The first issue for determination was whether, in respect of the year of assessment 1999, the respondent was entitled to raise an additional assessment on the appellant on 30 August 2007 without first complying with s 91(3) of the Act ie to prove that the appellant had committed fraud, or willful default or the appellant had been negligent. The second issue for determination was whether, in respect of years of assessment 1999, 2000 and 2002, the respondent was right in law in adopting a different accounting basis based on the Inland Revenue Board Public Ruling 3/2006 — Property Development and Construction Contracts ('PR 3/2006') in ascertaining the profit of the appellant when the appellant had adopted an accounting practice based on defect liability period ('DLP') method which was in accordance with the industry practice as well as a generally accepted accounting standard. The latter issue was supported by the evidence of the appellant's witness ('AW1') which was not challenged by the respondent.

Held, allowing the appeal with costs of RM5,000:

(1) As there was no law to regulate the computations of income with respect to property and housing development, and the conduct of the respondent to accept and fully endorsed the DLP method adopted by the appellant for 26 years, the appellant which had adopted consistently a method of accounting which was a generally well accepted method in the

industry could not be accused of committing fraud and or willful default or negligence. Thus, the respondent had failed to discharge the burden imposed by s 91(3) of the Act, in that it had failed to demonstrate a case of fraud and/or willful default and/or negligence so as to allow the respondent to claim the additional assessment beyond the period provided by the statute (see paras 30–31).

(2) Since there were two accounting method which could be used for ascertaining of income of taxpayer, the appellant ought not to be faulted if it had opted for the DLP method. The PR 3/2006 had come into existence only on 13 March 2006. Hence it was unreasonable for the respondent to impose the PR 3/2006 on the appellant retrospectively so as to affect all the assessments made before the coming into force of PR 3/2006 which had been accepted as final and conclusive pursuant to s 97(1) of the Act (see paras 44–46).

(3) As the appellant was not shown to have submitted incorrect information and/or incorrect returns, had made full disclosures pertaining to the method of computations in recognising its income and it was a matter of interpretation or difference of opinion with respect to which method was to be adopted, hence, s 113(2) of the Act ought not to be applied to the appellant (see para 48).

[Bahasa Malaysia summary

Ini merupakan satu rayuan terhadap keputusan Pesuruhjaya Khas Cukai Pendapatan ('PKCP') yang menolak rayuan perayu dan mengesahkan keputusan responden untuk mengenakan taksiran tambahan ke atas perayu bagi tahun taksiran 1999, 2000 dan 2002; dan pengenaan penalti ke atas perayu di bawah s 113(2) Akta Cukai Pendapatan 1967 ('Akta'). Isu pertama untuk ditentukan adalah sama ada, berhubung tahun taksiran 1999, responden berhak untuk membangkitkan taksiran tambahan kepada perayu pada 30 Ogos 2007 tanpa terlebih dahulu mematuhi s 91(3) Akta iaitu untuk membuktikan bahawa perayu telah melakukan penipuan, atau pelanggaran sengaja atau perayu telah cuai. Isu kedua untuk ditentukan adalah sama ada, berhubung tahun taksiran 1999, 2000 dan 2002, responden bertindak tepat dari segi undang-undang dalam mengguna pakai dasar perakaunan yang berbeza berdasarkan Ketetapan Lembaga Hasil Dalam Negeri Awam 3/2006 — Pembangunan Hartanah dan Kontrak Pembinaan ('PR 3/2006') dalam menentukan keuntungan perayu manakala perayu telah menerima pakai amalan perakaunan berdasarkan kaedah tempoh liabiliti kecacatan ('TLK') iaitu mengikut amalan industri begitu juga dengan standard perakaunan yang diterima umum. Isu kedua disokong oleh keterangan saksi perayu ('AW1') yang tidak dicabar oleh responden.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000:

(1) Memandangkan tiada undang-undang untuk mengawal selia pengiraan pendapatan berhubung pembangunan hartanah dan perumahan, dan tindakan responden untuk menerima dan menyokong sepenuhnya kaedah TLK yang diguna pakai oleh perayu selama 26 tahun, perayu yang mengguna pakai secara konsisten kaedah perakaunan yang umumnya merupakan satu kaedah yang diterima baik dalam industri tidak boleh dituduh melakukan penipuan dan atau pelanggaran sengaja atau kecuaian. Oleh itu, responden gagal untuk melepaskan beban yang dikenakan oleh s 91(3) Akta, iaitu bahawa dia gagal untuk menunjukkan kes penipuan dan/atau pelanggaran sengaja dan/atau kecuaian yang membolehkan responden untuk menuntut penilaian tambahan melebihi tempoh yang diperuntukkan oleh statut (lihat perenggan 30–31).

(2) Oleh kerana terdapat dua kaedah perakaunan yang boleh digunakan untuk menentukan pendapatan pembayar cukai, perayu tidak sepatutnya disalahkan jika ia memilih untuk kaedah DLP PR 3/2006 yang wujud hanya pada 13 Mac 2006. Oleh itu adalah tidak munasabah bagi responden untuk mengenakan PR 3/2006 ke atas perayu secara retrospektif yang menjejaskan semua taksiran yang telah dibuat sebelum permulaan penguatkuasaan PR 3/2006 yang diterima sebagai terakhir dan muktamad menurut s 97(1) Akta (lihat perenggan 44–46).

(3) Memandangkan perayu tidak ditunjukkan telah mengemukakan maklumat yang tidak betul dan/atau pulangan yang tidak betul, telah membuat pendedahan penuh berkaitan dengan kaedah pengiraan dalam mengiktiraf pendapatannya dan adalah perkara tentang tafsiran atau perbezaan pendapat berhubung kaedah yang perlu diguna pakai, dengan itu, s 113(2) Akta tidak seharusnya terpakai kepada perayu (lihat perenggan 48).]

Notes

For cases on additional assessment, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2495–2516.

Cases referred to

Bedford Damansara Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Civil Appeal No R1–14–14 of 2011), (unreported) (refd)

Belaboh Realty Sdn Bhd v KPHDN (Tax Appeal 14–02 of 2007–11), (unreported) (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473, SC (refd)

Chua Lip Kong v Director-General of Income Tax [1982] 1 MLJ 235, PC (refd)

Derry v Peek (1889) 14 App Cas 337, HL (refd)

Frederick Lack Ltd v Doggett (H M Inspector of Taxes) 46 TC 524, HC (refd)

Gallagher v Jones (Inspector of Taxes); Threlfall v Jones (Inspector of Taxes) [1993] STC 537, CA (refd)

American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue [1979] 1 MLJ 1, PC (refd)
J Rowe & Sons Pty Ltd v FCT 71 ATC 4157, HC (refd)
KPHDN v Viva Life Science Sdn Bhd (Civil Appeal No W-01–687–11 of 2011), (unreported) (refd)
Odeon Associated Theatres Ltd v Jones (H M Inspector of Taxes) 48 TC 257, HC (refd)
PKCP (R) Liquidator bagi YF Development Sdn Bhd v Ketua Hasil Dalam Negeri (1966) MSTC 2.526 (refd)
Whismur & Co v The Commissioners of Inland Revenue 12 TC 818 (refd)
Wellington v Reynolds (H M Inspector of Taxes) 40 TC 209, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 24(1)(a), 91, 91(3), 97, 97(2), 113(2)

Francis Tan (Gan Chwee Yen with him) (Azman Davidson & Co) for the appellant.
Ishak bin Mohd Hassan (Kwan Huey Shin with him) (Legal Officers, Inland Revenue Board of Malaysia) for the respondent.

Asmabi Mohamad J:

INTRODUCTION

[1] This is an appeal by Pasdec Corp Sdn Bhd ('the appellant') against the deciding order ('DO') of the Special Commissioners of Income Tax ('SCIT') dated 30 August 2013, which rejected the appellant's appeal and affirmed the decision of Director General of Inland Revenue ('the respondent') to impose additional assessments on the appellant with respect to years of assessment 1999, 2000 (current year basis) and 2002.

[2] The appellant had also appealed against the imposition of penalties on the appellant under s 113(2) of the Income Tax Act 1967 ('the Act'), which was also rejected by the SCIT.

[3] Amongst the grounds relied by the SCIT were:

(a) the respondent was right in adopting a different accounting basis in ascertaining the profit of the appellant, based on the 'certificate of fitness' or *sijil siap menduduki* for years of assessment 1999, 2000 (current year basis) and 2002, which is more reasonable and justifiable. This is due to the fact that on the date of the issuance of the certificate of fitness, the final account for the housing project can be prepared as the contractor's costs have been finalised and could be ascertained;

(b) further, the housing or property project that had been issued with the CF is satisfactorily completed construction-wise and fit and safe for human habitation;

(c) the method adopted by the appellant amounted to deferment of income reporting. Hence the appellant was in breach of the law or safety issues and utilities laid down in *Belaboh Realty Sdn Bhd v KPHDN* (Tax Appeal 14–02 of 2007–11), (unreported), which ruled that pursuant to s 24(1)(a) of the Act, the income from the business must be taxed in the same year that it is earned;

(d) that the provision of the Act must be strictly applied in the computation of the profits or gains of a person chargeable to tax;

(e) notwithstanding any practice being not inconsistent with the provisions of the Act, the respondent has the discretion to improve or replace it with any other method which is more suitable; and

(f) there can be no deferment of income recognition and income reporting.

THE ADDITIONAL TAXES AND PENALTIES

[4] The additional taxes assessed and penalties imposed by the respondent on the appellant which is the subject matter of the appeal were as shown in the table below:

No.	Year of Assessment	Additional Tax (RM)	Penalty (RM)
1.	1999	332,900.17	126,178.41
2.	2000 (current year basis)	168,160.30	1,294.02
3.	2002	681,174.45	165,813.73

ISSUES POSED FOR DETERMINATION

[5] The issues that were framed, agreed upon and posed for the SCIT's determination could be stated as follows:

(a) in respect of the year of assessment 1999, whether the respondent is entitled to raise an additional assessment on the appellant on 30 August 2007 without first complying with s 91(3) of the Act; and

(b) in respect of all the years under appeal (year assessment 1999, year of assessment 2000 (current year basis) and year of assessment 2002), whether the respondent is right in law in adopting a different accounting basis in ascertaining the profit of the appellant when the appellant has adopted an accounting practice which:

(i) is in accordance with industry practice and generally accepted accounting standard;

(ii) has been consistently followed;

(iii) is not inconsistent or against any written law; and

(iv) has in fact been accepted by the respondent up to 2006.

THE PROVED FACTS AS FOUND BY THE SCIT

[6] The 'proved facts' relating to the issue at hand could be found at pp 4–19 of the case stated, which is the material which this court ought to peruse and consider (see para 7 of Document '1'). For ease of reference, some of the salient proved facts with respect to the defect liability period method adopted by the appellant are reproduced verbatim as follows:

(a) the appellant is a company incorporated in Malaysia carrying on the business of housing and property development with minor involvement in share investment ('see para 7(i)');

(b) the appellant was initially a property development unit of Perbadanan Kemajuan Negeri Pahang, which is a state agency for the State Government of Pahang ('see para 7(ii)');

(c) in respect of housing and property development business, the appellant prepared its accounts year after year beginning from year 1980 (when it commenced business) up to the year 2006 based on the date of the defect liability period ('DLP method') and the income from the property development projects was recognised by the appellant based on DLP method, before the advent of the Inland Revenue Board Public Ruling 3/2006 — Property Development and Construction Contracts ('PR 3/2006') ('see para 7(iv)');

(d) the PR 3/2006 was issued on 13 March 2006 and is effective from the year of assessment 2006 and subsequent years of assessment, which the appellant then duly followed beginning year of assessment 2006 ('see para 7(v)');

(e) the appellant's witness ('AW1') testified that the DLP method is the method where the income or profit will only be fully recognized after the expiry of the defect liability period of a particular property development project. The date of completion of a property development project would be the date of the expiry of the defect liability period ('see para 7(vi)');

(f) the appellant took the stand that the DLP method is in accordance with industry practice and it is also generally accepted accounting standard in Malaysia ('see para 7(vii)');

(g) the appellant took the stand that the benefit of using DLP method is that it takes into consideration all costs and expenses (which include costs of making good the defects and various claims from property buyers during the defect liability period in particular, property development project). The adjusted income calculated and computed using this method is more

realistic as it takes into account all the possible costs and expenses directly attributable to the generation of income ('see para 7(viii)');

(h) furthermore, it can be used for performance measurement and appraisal on profitability of a particular property development project ('see para 7(ix)');

(i) for the three tax years under appeal (YA 1999, 2000 (current year basis) and YA 2002) the appellant computed its accounts for income tax purposes based on the DLP method to recognise the income from the development projects. The respondent had duly accepted the appellant's tax computations and issued assessments for the aforesaid tax years under appeal (see for example Form J 1999 and Form J 2000, at pp 4–5 exh B) ('see para 7(x)');

(j) the respondent did not revise or make adjustments to Form J 1999 and Form J 2000, not until 30 August 2007 ('see para 7(xi)');

(k) the appellant's auditor had plainly expressed the opinion that the appellant's audited accounts for tax years under appeal have been drawn up, to show a true and fair view of the state of affairs of the appellant (see pp 33, 57 and 83 of exh B) ('see para 7(xii)');

(l) later, a tax audit on the appellant's accounts was conducted by the respondent. As a result of the tax audit the respondent now did not agree to the application of the DLP method adopted by the appellant in recognising its income for income tax purposes from the development projects. Instead the respondent took the view that the DLP method is not acceptable for income tax purposes ('see para 7(xiii)');

(m) prior to the PR 3/2006 which came into effect beginning YA 2006, there was no law or guidelines issued by the respondent that prescribed the use of the certificate of fitness method in property development industry ('see para 7(xviii)'); and

(n) the respondent conducted two tax audit sessions on the appellant's audited accounts. The first session was on 1 June 2005 – 3 June 2005, followed by the second session was on 17 April 2006 – 19 April 2006 ('see para 7(xxi)').

THE CONTENTIONS OF THE PARTIES

By the appellant

[7] In the course of the submission before the SCIT as well as before me, the appellant raised the following arguments:

(a) with respect to the year of assessment 1999, the respondent had failed to discharge the burden imposed on it by s 91(3) of the Act, to prove that the appellant had committed fraud, or willful default or the appellant had been negligent;

(b) the accounting method adopted by the appellant for years of assessment 2000 (current year basis) and 2002 was correct in law; and

(c) the penalties imposed by the respondent was wrong in law as the appellant did not furnish any false or wrong information and/or had understated its income. The respondent had failed to meet with the threshold to impose penalty under s 113(2) of the Act.

By the respondent

[8] The respondent, on the other hand submitted as follows:

(a) the appellant's method of calculation of recognising completion of projects only upon the expiration of the defect liability period or upon finalisation of sale of houses result in a deferment of income reporting;

(b) although the appellant is a developer, in terms of income recognition, the appellant is a taxpayer and shall be bound by the same provisions of the Act just like any other taxpayers;

(c) it is only upon audit findings that the respondent has unearthed evidence that the appellant had deferred reporting of income from its projects; and

(d) with regard to the penalties under s 113(2) of the Act, the respondent has a wide discretion to impose the 45% penalties on the appellant having considered the factual matrix and upon taking into consideration all the circumstances surrounding the appellant's case.

DUTIES OF THE COURT IN A CASE STATED

[9] In dealing with appeal at hand, I am mindful of the general principle enunciated in the often-quoted Privy Council case of *Chua Lip Kong v Director-General of Income Tax* [1982] 1 MLJ 235 where Lord Diplock had stated that the findings made by the SCIT are generally unassailable and can never be overruled nor supplanted by the High Court. However if it can be shown that the SCIT has proceeded upon some erroneous assumption as to the relevant law, only then could the High Court embark on a curial intervention to avoid any injustice to the parties concerned.

[10] When the case stated comes before this court, it is my duty to examine the determination, having regard to the relevant law, if the case stated contains anything ex-facie bad in law or it is such that no person acting judicially and properly instructed as to the relevant law could have come to such decision, and/or if the findings or inferences are unsupported by the evidence, only then this court can intervene to set the records right.

A DISCUSSIONS OF THE ISSUES AND DECISION OF THE COURT

[11] The court would make general findings before delving with the issues raised by the parties. Prior to the Public Ruling 3/2006 which came into effect beginning YA 2006, there was no law or guidelines issued by the respondent that prescribe the use of the certificate of fitness method in property development industry.

[12] It is not disputed that for the three tax years under appeal (YA 1999, 2000 (current year basis) and YA 2002) respectively concerning the appellant's housing and property development business, the appellant prepared its accounts, year after year beginning from year 1980 (when it commenced business) up to the year 2006 based on the DLP method, before the advent of the Inland Revenue Board Public Ruling 3/2006 — Property Development and Construction Contracts ('PR 3/2006') dated 13 March 2006 ('see para 7(iv)').

[13] It was also not disputed that respondent had duly recognised and accepted the appellant's tax computations from the year 1980 up to the time the PR 3/2006 was introduced based on the DLP method and issued assessments for the aforesaid tax years based on this method (see Form J 1999 and Form J 2000, at pp 4–5 of exh B). For some 26 years, the respondent had never complained or claimed that the tax computations method based on the DLP method contravened the provisions of the Act.

[14] It was also not disputed that the DLP method adopted by the appellant at the material times was in accordance with the industry practice as well as a generally accepted accounting standard. This was proven by the evidence of the appellant's witness, AW1 which was not challenged at all by the respondent during the hearing before the SCIT.

[15] The appellant's witness ('AW1') testified that the DLP method is the method where the income or profit will only be fully recognised after the expiry of the defect liability period of a particular housing or property development project. The date of completion of a property development project will be the date of the expiry of the DLP period.

[16] The appellant took the stand that the benefit of using DLP method is that it takes into consideration all costs and expenses (which include costs of making good the defects and various claims from property buyers during the defect liability period) in particular property development project. The adjusted income calculated and computed using this method is more realistic as it takes into account all the possible costs and expenses directly attributable to the generation of income.

In respect of the year of assessment 1999, whether the respondent is entitled to raise an additional assessment on the appellant on 30 August 2007 without first complying with s 91(3) of the Act

[17] In this appeal with respect to year of assessment 1999, the respondent had raised the assessment out of the statutory time frame provided by the Act. The appellant was proceeding with the assessment on the basis that there has been negligence on the part of the appellant in declaring its income.

[18] The respondent had relied on, amongst others, cases such *Frederick Lack Ltd v Doggett (H M Inspector of Taxes)* 46 TC 524: *Wellington v Reynolds (H M Inspector of Taxes)* 40 TC 209; *Derry v Peek* (1889) 14 App Cas 337 as well as the literature in the book 'Malaysian Taxation' written by Veerinderjit Singh, *Malaysian Master Tax Guide and Whiteman on Income Tax* pertaining to the meanings of the words 'fraud', 'wilful default' or 'negligence' to which I have perused and referred to.

[19] With respect to YA 1999, the relevant section of the law applicable is s 91(3) of the Act, which provides that the respondent may at any time make an assessment in respect of any taxpayers for any year of assessment for the purpose of making good any loss of tax attributable to fraud, willful default or negligence in question. In short, s 91(3) of the Act allows the respondent to make an assessment in respect of a 'statute bar' claim.

[20] It has been held in the case of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 that the burden is on the respondent to show on the balance of probabilities that the appellant had intentionally submitted the tax return or furnish information to the respondent which the appellant knew was false or did not believe in their truth or recklessly not caring whether they were true or false.

[21] It was the contention of the appellant that the negligence was found during the audit. In order to prove that the appellant was negligent, the respondent relied on the evidence of one, Noor Azman bin Ahmad Johari ('RW1') where evidence was led that the appellant had used the DLP method instead of the CF method, notwithstanding that the appellant had no consistent method of ascertaining the date of the completion of the project and had never submitted its final account with respect to any of its projects.

[22] It was further contended by RW1 that the appellant ought to prepare its final account on the date of the CF to show actual cost incurred in the construction of the houses until these houses could be occupied at the time CF

had been issued. The audit conducted by the respondent disclosed that the appellant recognised income from the projects carried out by applying 'Kaedah Peratusan Siap Berasaskan Kos'.

[23] The respondent contended that the appellant had been negligent by not closing its account and that its final account had not been prepared based on the date of the certificate of occupation of the building or the CFO having been issued.

[24] The appellant had submitted to the respondent its tax return for the year of assessment 1999 which was duly examined by the respondent who then made some amendments to reflect the correct income of the appellant for purposes of assessment of tax for YA 1999. Vide the respondent's letter dated 24 September 1999 the respondent had also attached the assessment notice for the appellant's perusal and attention.

[25] At the time the appellant submitted to the respondent its tax return with respect to YA 1999, a copy of the audited accounts were also submitted for the respondent's perusal and consideration. Therefore the respondent had full knowledge and was fully acquainted with the accounting method adopted by the appellant for purposes of its taxes. The respondent had accepted the DLP method submitted by the appellant and made the necessary amendments and notified the appellant of its tax assessment. The appellant acted upon what was submitted and duly paid its taxes for YA 1999 to the respondent.

[26] From the proved facts in the case stated, it would appear that there has been no suppression of information on the part of the appellant and/or evidence of fraud, wilful default or negligence. What really changed was the method adopted by the respondent in computing the income with respect to development business.

[27] In view of the above, the amount assessed by the respondent with respect to YA 1999 shall be final and conclusive for the purpose of the Act (see s 97 of the Act).

[28] Pursuant to s 97(2) of the Act, the burden lies on the respondent to prove that the appellant had been guilty of fraud or negligence. Based on the proved facts contained in the case stated submitted to this court, I am satisfied that the respondent had failed to discharge the burden placed on him by the law that the appellant was negligent in submitting its tax returns using the DLP method.

[29] It is observed that from the evidence of AW1 of the appellant and RW1 of the respondent, there was a difference of opinion as to the computation of

income with respect to property and housing development business. The fact that the respondent had allowed and encouraged the appellant to use the DLP method goes to prove that until PR 3/2006 was issued, the respondent was not certain as to the correct method of computations of income of the property and housing development business. As there was no public ruling prior to the issuance of PR 3/2006, what really matters was the timing issue and it has nothing to do with fraud and/or any willful default and/or negligence. Further the DLP method has merits as well as being accepted in the property and housing development industry for the following reasons:

(a) the DLP method is accurate as it recognises the result of a project at the end of the legal obligation of the developer under the sale and purchase agreement, at the expiry of the defect liability period;

(b) the DLP method adopted by the appellant is in line with the industry's practice and a generally accepted accounting standard. AW1 had testified to this fact and his evidence remained unchallenged;

(c) with respect to the DLP method it is a good measure of performance for a project; and

(d) this was further supported by the auditors making the computations stating that the accounts of the appellant had been drawn up to show a true and fair view of the state of affairs of the appellant. As shown earlier for some 26 years, the respondent had accepted the DLP method until the point PR3/2006 was issue.

[30] It is obvious that the additional assessment was made because of the difference of opinion on accounting methods. As there was no law to regulate the computations of income with respect to property and housing development, and the conduct of the respondent to accept and fully endorsed the DLP method adopted by the appellant for 26 years, the appellant which has adopted consistently a method of accounting which is a generally well accepted method in the industry could not be accused of committing fraud and or willful default or negligence (see *J Rowe & Sons Pty Ltd vs FCT* 71 ATC 4157; *Odeon Associated Theatres Ltd v Jones (H M Inspector of Taxes)* 48 TC 257).

[31] On the totality of the evidence before me as found in the case stated with respect to YA 1999, the respondent had failed to discharge the burden imposed by s 91(3) of the Act, in that it had failed to demonstrate a case of fraud and/or willful default and/or negligence so as to allow the respondent to claim the additional assessment beyond the period provided by the statute.

[32] Neither was the appellant's accountant cross-examined on the issue of negligence to justify the imposition of additional taxes levied against the appellant. Based on the proved facts, there was no justification for the

respondent to suggest that the appellant was negligent in submitting its tax returns using the DLP method as was done in this case.

[33] Therefore, it is not opened to the respondent to rely on s 91 of the Act to extend the time within which it could impose additional tax on the appellant as the respondent was bound by limitation. The respondent could not establish negligence on the part of the appellant herein. I am of the view that the respondent had not satisfied that there was negligence to justify its act in imposing additional taxes.

[34] In support of this I would rely on the case of *Bedford Damansara Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Civil Appeal No R1–14–14 of 2011), (unreported) where His Lordship Justice Abang Iskandar (as His Lordship then was) had relied on *Browne v Dunn* (1893) 6 R 67 which stated that if the appellant's witness had not been cross-examined on the issue of negligence with respect to his belief of the correctness of the accounting method adopted, this had prejudiced the appellant.

[35] Likewise in the case at hand there was no evidence led before the SCIT to show that the appellant's witness AW1 was cross-examined on the issue of negligence with respect to his belief of the correctness of the accounting method adopted. This, I think, had prejudiced the appellant. In any event this mode of computations had been adopted by the respondent for the past 26 years without any problem and/or qualms.

[36] As such I am of the humble view that the respondent had failed to discharge the burden placed on it by the Act to prove negligence. In view of the above the additional taxes imposed for YA 1999 was barred by virtue of s 91. Likewise the penalties imposed too was wrong in law and unjustified.

In respect of all the years under appeal (year assessment 1999, year of assessment 2000 (current year basis) and year of assessment 2002), whether the respondent is right in law in adopting a different accounting basis in ascertaining the profit of the appellant when the appellant has adopted an accounting practice which:

(e) *is in accordance with industry practice and generally accepted accounting standard;*

(f) *has been consistently followed;*

(g) *is not inconsistent or against any written law; and*

(h) *has in fact been accepted by the respondent up to 2006.*

[37] The respondent did not revise or make adjustments to Form J 1999 and Form J 2000 until 30 August 2007 when the tax audit was conducted on the

appellant's accounts and by which time PR 3/2006 had already come into existence. As a result of the tax audit the respondent did not agree with the adoption of the DLP method and favoured the CF method instead.

[38] From the evidence of AW1, the tax computations for the year assessment 1999 have been submitted to the respondent and on the basis of those computations, the notices were issued. The appellant had been adopting the same method of computations for almost 26 years without query or qualms by respondent. As stated above, there were no guidelines or law to guide the appellant with the computations until the implementation of the PR 3/2006.

[39] It is the court's finding that what matters here was whether the method of calculations was accepted that it was in accordance with the standard practice of commercial accounting in relation to the property and housing development. This was supported by the evidence of the professional accountant who prepared the tax returns of the appellant for purposes of submission to the respondent which was uncontroverted by evidence adduced by the appellant. This was further supported by the evidence by way of case stated that the DPL method had been adopted and accepted by the respondent.

[40] As there was no evidence found by the SCIT to counter the unchallenged evidence of AW1, the fact remains that the DLP method was an accepted accounting method which was in accord with the standard practice of commercial accounting involving property and housing development at the material time without any query by respondent for 26 years.

[41] The recognition of DLP method computations adopted by the appellant had been discussed in para 29(a)–29(d) and for want of duplicity the same is adopted herein.

[42] For the purpose of this issue the SCIT had referred to amongst others *PKCP (R) Liquidator bagi YF Development Sdn Bhd v Ketua Hasil Dalam Negeri* (1966) MSTC 2.526; *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1979] 1 MLJ 1; *Belaboh Realty Sdn Bhd v KPHDN* (Tax Appeal 14–02–2007 of 2011), (unreported) where generally these cases had held that the general scheme of the Act is that income tax is charged on the income earned in the relevant basis year. A housing developer must be taxed just like any other trader and for purposes of his gross income for a basis period the sales of units, work in progress and stock-in-trade must be taken into account.

[43] Based on the above the SCIT concluded that the principles that may be gleaned from the above cases were as follows:

(a) the provisions in the Act must be strictly complied with and applied in the computation of profits or gains of a person chargeable to tax;

(b) the general scheme of the Act is that the income tax is chargeable on the income earned in the relevant basis year;

(c) notwithstanding any accounting practice being not inconsistent with the provisions of the Act, the respondent has the discretion to improve or replace it with another method which is more suitable;

(d) the respondent must act within the provisions of the Act when and if it improves upon or replaces any accounting practice in connection with the computation of tax return;

(e) no accounting practice is sacrosanct except for the same that the respondent adopts and deems in compliance with the provisions of the act; and

(f) there can be no deferment of income recognition and income reporting.

[44] Despite the above, it was not disputed that at the material time PR 3/2006 had not come into force yet. There was no specific guideline and/or law which provide the method for the computations of the income earned by the housing developer or property business for the purpose of income tax. As such any acceptable accounting method could be used for the ascertaining of income of a taxpayer. This principle had been settled in cases such as *Whismur & Co v The Commissioners of Inland Revenue* 12 TC 818; *Gallagher v Jones (Inspector of Taxes); Threlfall v Jones (Inspector of Taxes)* [1993] STC 537 and *Odeon Associated Theatres Ltd v Jones (H M Inspector of Taxes)* 48 TC 257.

[45] As there were two accounting method which could be used the appellant ought not to be faulted if it had opted for the DLP method. More so when the method of computations of income had not been stipulated in the Act. Neither had there been guidelines issued with regard to the computation of earnings.

[46] The PR 3/2006 had come into existence only on 13 March 2006. Hence it was unreasonable for the respondent to impose the PR 3/2006 on the appellant retrospectively so as to affect all the assessments made before the coming into force of PR 3/2006 which had been accepted as final and conclusive pursuant to s 97(1) of the Act.

PENALTIES

[47] For the reasons that I had mentioned above, I am of the view that the respondent was wrong in imposing the penalties on the appellant under s 113(2) of the Act. Even assuming that the incorrect returns and/or incorrect

information was submitted the same was made in good faith where full disclosures were made to the respondent. This was supported by the case of *KPHDN v Viva Life Science Sdn Bhd* (Civil Appeal No W-01–687–11 of 2011), (unreported).

[48] As the appellant was not shown to have submitted incorrect information and/or incorrect returns, had made full disclosures pertaining to the method of computations in recognising its income and it is a matter of interpretation or difference of opinion with respect to which method was to be adopted, I am of the view that the s 113(2) of the Act ought not to be applied to the appellant.

CONCLUSION

[49] Based on the aforesaid and in the light of the clear facts as shown in the preceding paragraphs and having considered the issues raised by both the parties in their respective written submissions as well as the oral submission before me, I am satisfied that there are merits in this appeal. Therefore the appellant's appeal is allowed with costs of RM5,000 to be awarded by the respondent to the appellant.

Appeal allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar